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No. 85-1394

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

DAVID F. HAGLER,

Petitioner,

v.

WILLIAM L. CALLAHAN, et al.

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

BRIEF OF APPELLANT

KENNETH O. EIKENBERRY
Attorney General

MICHAEL P. LYNCH
Assistant Attorney General

TIMOTHY R. MALONE
Assistant Attorney General

Attorneys for Respondent/
Cross-Petitioner

Temple of Justice
Olympia, Washington 98504
(206) 586-1415
March 19, 1986

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances, if ever, can the giving of a jury instruction unconstitutional under *Sandstrom v. Montana,* 442 U.S. 510 (1979) be held harmless? (This question is similar identical to the question presented in *Rose v. Clark,* No. 84-1974, (cert. granted October 7, 1985).

2. Even if *Sandstrom* error can be held harmless in some cases, can it be held harmless in the present case, in which specific intent was an element of the crime, the defense did not concede the issue of specific intent, and although there was an alibi defense, the defense also presented evidence to negate specific intent?

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ARGUMENT

Any error in jury instruction No. 15 was harmless beyond a reasonable doubt, and this claim is procedurally barred.

While the Respondent would agree that this Court should decide under what circumstances a jury instruction violative of *Sandstrom v. Montana*, 412 U.S. 510 (1979) can be harmless, this case does not present either the appropriate factual background or procedural posture for a proper resolution of that issue.

The majority opinion of the Ninth Circuit agreed with the Washington Supreme Court that intent was not disputed at Mr. Hagler's trial. *Hagler v. Callahan*, 764 F.2d

711, 714 (9th Cir. 1985); *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103, 1109 (1982).

The defense proffered by Mr. Hagler at trial was that of alibi.

Although the Petitioner creatively attempted to argue that there was evidence introduced at trial that could have led the jury to conclude the homicide was something less than intentional, this evidence consisted of four undisputed facts:

1. The victim had a bad temper;
2. The victim drank to excess;
3. The victim owned and was known to recklessly handle guns;
4. Any shot fired in the victim's trailer would necessarily have been fired at close range.

The Ninth Circuit properly concluded that these facts only related to the victim's general character and said nothing of the assailant's intent at the time of the murder.

The evidence of intent was extremely strong. The victim, Mr. Ellington, was shot three times, twice in the head, and one of the shots was fired at point blank range.

Ballistics evidence at the trial indicated that the victim had been shot with a .38 caliber five-groove, right-twisted rifling gun, such as the Smith & Wesson owned by Mr. Hagler. Mr. Hagler's snub-nosed .38 was found at the bottom of a local river by divers several months after the murder. There is no real question that the jury in this case concluded that it was Mr. Hagler's Smith & Wesson that indeed murdered Mr. Ellington. The jury found Mr. Hagler to be the murderer, without any possible effect from the *Sandstrom* jury instruction.

Clearly, intent was not an issue in Mr. Hagler's trial, therefore the *Sandstrom* jury instruction could not have affected the outcome of the trial and was harmless. *See, Chapman v. California*, 386 U.S. 18 (1967).

Moreover, in this case the Petitioner was subject to a procedural bar by the Washington State Supreme Court. *See In re Hagler, supra; see also* Respondent's Cross-Petition For Writ of Certiorari. Although the District Court found that the state court had ignored the Petitioner's pro-

cedural default, the issue was raised and preserved in the Ninth Circuit Court of Appeals, which found it unnecessary to address the Respondent's procedural default argument, because it reversed on the merits. *Hagler v. Callahan, supra* at 713, fn. 2.

Petitioner Hagler cannot satisfy either the "cause" or "prejudice" prong of *Wainwright v. Sykes,* 433 U.S. 72 (1977), and therefore a grant of certiorari based upon Petitioner's *Sandstrom* claim would not be productive due to the alternative grounds for denial of habeas corpus; i.e., the imposition of a procedural bar by the state court as a result of the Petitioner's failure to establish the prejudicial error exception to Washington State's procedural default rule. *See In re Hagler, supra.*

For the foregoing reasons, the Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED this 19th day of March, 1986.

KENNETH O. EIKENBERRY
Attorney General

MICHAEL P. LYNCH
Assistant Attorney General
Counsel for Respondent